

OFFICE OF LEGISLATIVE LEGAL SERVICES

COLORADO GENERAL ASSEMBLY

DIRECTOR
Sharon L. Eubanks

DEPUTY DIRECTOR
Julie A. Pelegrin

REVISOR OF STATUTES
Jennifer G. Gilroy

ASSISTANT DIRECTORS
Jeremiah B. Barry Gregg W. Fraser
Christine B. Chase Duane H. Gall

PUBLICATIONS COORDINATOR
Kathy Zambrano



**COLORADO STATE CAPITOL
200 EAST COLFAX AVENUE SUITE 091
DENVER, COLORADO 80203-1716**

TEL: 303-866-2045 FAX: 303-866-4157
EMAIL: OLLS.GA@STATE.CO.US

MANAGING SENIOR ATTORNEYS
Michael J. Dohr Robert S. Lackner
Jason Gelender Thomas Morris

SENIOR ATTORNEYS
Jennifer A. Berman Jerry Payne
Brita Darling Jane M. Ritter
Edward A. DeCecco Richard Sweetman
Kristen J. Forrestal Esther van Mourik
Nicole H. Myers

SENIOR ATTORNEY FOR ANNOTATIONS
Michele D. Brown

STAFF ATTORNEYS
Jacob Baus Shelby L. Ross
Conrad Imel Yelana Love
H. Pierce Lively Megan Waples

MEMORANDUM

TO: Committee on Legal Services

FROM: Jennifer Berman, Office of Legislative Legal Services

DATE: November 7, 2018

SUBJECT: Rules of the Parks and Wildlife Commission, Department of Natural Resources, concerning general provisions – aquatic nuisance species, 2 CCR 406-0 (LLS Docket No. 180140; SOS Tracking No. 2018-00036).¹

Summary of Problem Identified and Recommendation

Section 33-10.5-105 (1)(a), C.R.S., prohibits a person from possessing, importing, exporting, shipping, or transporting an aquatic nuisance species. But the Parks and Wildlife Commission's Rule #012 F. allows the Division of Parks and Wildlife or a permit issued by the Department of Agriculture to authorize the import, transport, possession, or release of an aquatic nuisance species. **Because Rule #012 F. conflicts with the statute, we recommend that Rule #012 F. of the rules of the Parks and Wildlife Commission concerning general provisions not be extended.**

¹ Under § 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under § 24-4-103 (8)(c)(I), C.R.S., the rules discussed in this memorandum will expire on May 15, 2019, unless the General Assembly acts by bill to postpone such expiration.

Analysis

1. The Commission's rule #012 F. conflicts with statute because the rule allows a person to import, transport, possess, or release an aquatic nuisance species if authorized by the Division or by a Department of Agriculture permit, but the statute prohibits *any* importation, transportation, possession, or shipment of an aquatic nuisance species.

Section 33-10.5-105, C.R.S., provides in pertinent part:

33-10.5-105. Prohibition of aquatic nuisance species - penalties. (1) A person shall not:

(a) Possess, import, export, ship, or transport an aquatic nuisance species;

Article 10.5 of title 33, C.R.S., concerning aquatic nuisance species, does not provide any exemptions from the prohibition listed in section 33-10.5-105 (1)(a), C.R.S.

In its rules regarding possession of aquatic wildlife, the Commission states in Rule #012 F.:

#012 - POSSESSION OF AQUATIC WILDLIFE

F. No person shall import, transport, possess, or release any aquatic nuisance species (ANS) except as authorized by the Division or permit issued under Title 35 C.R.S.

The Commission's rule allowing the Division or a permit issued by the Department of Agriculture to authorize the importation, transportation, possession, or release of an aquatic nuisance species directly conflicts with the statute's prohibition disallowing any person from possessing, importing, exporting, shipping, or transporting an aquatic nuisance species.

It appears that the reference to a permit issued under Title 35 C.R.S. refers to a permit issued by the Commissioner of Agriculture for an aquaculture facility for the operation of "a fish production facility" pursuant to section 35-24.5-109, C.R.S. Nothing in the Colorado Aquaculture Act, article 24.5 of title 35, C.R.S., creates an exemption for aquaculture facilities from the prohibition against possessing, importing, exporting, shipping, or transporting aquatic nuisance species. In fact, section 35-24.5-107 (2), C.R.S., of the Act provides that "[n]othing in this section diminishes or supersedes the authority of the division [of parks and wildlife] or the parks and wildlife commission to regulate or manage wild populations of aquatic organisms in the waters of the state". To the extent that Rule #012 F. authorizes permitted aquaculture facilities to possess, import, export, ship, or transport aquatic nuisance species, the rule conflicts with section 33-10.5-105 (1)(a), C.R.S.

The Commission has broad rulemaking authority regarding the prevention, control, containment, monitoring, and, as possible, eradication of aquatic nuisance species. Section 33-10.5-107 (2), C.R.S., requires the Commission to "promulgate rules to administer and enforce this article [10.5]". However, the Commission's broad rulemaking authority to enforce the aquatic nuisance species article does not allow the Commission to adopt rules that conflict with other statutory provisions regarding aquatic nuisance species.²

To the extent that the Commission intends the rule to authorize the Division's own conduct in managing the aquatic nuisance species program, the rule, as written, is not narrowly tailored to that purpose. As written, the rule allows the Division to exempt *any person* from the statutory prohibition. Regardless of how the rule is actually implemented, its language authorizes the Division to allow every instance in which an aquatic nuisance species is imported, transported, possessed, or released, thus completely negating the statutory language and rendering it superfluous.³

Because Rule #012 F. allows the Division or a permit issued by the Department of Agriculture to authorize the importation, transportation, possession, or release of aquatic nuisance species, the rule conflicts with the statute.

Recommendation

We therefore recommend that Rule #012 F. of the rules of the Parks and Wildlife Commission concerning general provisions not be extended because Rule #012 F. conflicts with statute.

S:\LLS\COLS\MEMOS\2018\180140JAB.docx

² See § 24-4-103 (8)(a), C.R.S. ("Any rule or amendment to an existing rule issued by an agency ... which conflicts with a statute shall be void").

³ See *Corley v. United States*, 556 U.S. 303, 314 (2009) (internal citation omitted) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant ...").